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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAYALLEN HERNANDEZ, Appellant.	)	2 CA-CR 2009-0064 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200400982

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant RayAllen Hernandez was convicted of one count of aggravated assault.[1] He was sentenced to an aggravated prison term of three years. On appeal, Hernandez argues the trial court erred in denying his pretrial motion to dismiss, in which he alleged the state had destroyed materially exculpatory evidence. He also contends the court violated his rights under the Sixth Amendment of the United States Constitution because the aggravating factors the trial court considered at sentencing were not stated in the indictment nor found by the jury beyond a reasonable doubt. For the following reasons, we affirm Hernandez's conviction and sentence.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the conviction[]." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). While being escorted to the shower, Hernandez, a prison inmate, slipped one hand out of his handcuffs and used them to strike a guard, W., in the face. The guard and Hernandez fought, but other guards eventually separated them. Hernandez was charged with and convicted of aggravated assault. This appeal followed.

Motion to Dismiss

¶3 Hernandez argues the trial court erred in denying his motion to dismiss in which he alleged the state had destroyed materially exculpatory evidence. We review a

[1]The indictment and sentencing minute entry state that Hernandez was charged with and convicted of aggravated assault pursuant to A.R.S. § 13-1204(A)(7). But § 13-1204 was amended after Hernandez was indicted but before he was sentenced, and several subsections were renumbered. *See* 2005 Ariz. Sess. Laws, ch. 166, § 3. The sentencing minute entry is therefore amended to indicate that Hernandez was sentenced under § 13-1204(A)(10), not § 13-1204(A)(7).

trial court's ruling on a motion to dismiss criminal charges, as well as the court's choice of an appropriate sanction for a violation of the discovery rules, for an abuse of discretion. *See State v. Magnum*, 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007); *State v. Lukezic*, 143 Ariz. 60, 69, 691 P.2d 1088, 1097 (1984).

¶4 Approximately one month after Hernandez was indicted, the state tendered its initial pretrial disclosure pursuant to Rule 15.1(a), Ariz. R. Crim. P. More than nine months later, Hernandez requested that the state disclose any relevant videotapes involving the assault. The state subsequently responded that any videotape had been recycled two months after the incident pursuant to standard procedure, and Hernandez filed a motion to dismiss the case.

¶5 During a hearing on Hernandez's motion, the state argued that the videotape had not depicted the actual assault but only the prison's subsequent response. A detective for the Arizona Department of Corrections explained that, after such an incident occurs in the prison, an officer responds to videotape the aftermath. If the videotape of the aftermath is not seized by an investigating officer as evidence in a case, "it gets recycled, . . . rewound and taped over." Because the videotape made following Hernandez's assault was never seized, it was taped over pursuant to prison protocol and therefore no longer contained footage of the incident.

¶6 The trial court accepted the state's avowal that the videotape Hernandez requested did not depict the actual assault but only "events that occurred after" other officers arrived at the scene. The court therefore denied Hernandez's motion to dismiss

but ruled he was entitled to a "'*Willits*' instruction at the trial . . . regarding the video recording."

¶7 Hernandez does not challenge the propriety of the *Willits* instruction. Instead, he contends the videotape was necessary because it could have created "reasonable doubt in the minds of the jury as to whether [Hernandez] attacked [the guard] or whether [the guard] started a fight," and therefore argues that the *Willits* instruction was "not a sufficient sanction" for the state's failure to produce the videotape.

¶8 But Rule 15.7(a) states that "[a]ll orders imposing sanctions shall take into account the significance of the information not timely disclosed." And "a discovery sanction should be proportionate to the harm caused." *State v. Krone*, 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995). Moreover, any sanction "should have a minimal effect on the evidence and merits of the case." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

¶9 Here, the videotape had little evidentiary significance; it depicted only the aftermath of the assault, not the assault itself, which is the event Hernandez claims the tape could have clarified. The videotape therefore could not have demonstrated whether the victim had provoked Hernandez's assault. Dismissal is one of the most serious sanctions available under Rule 15.7 and was unwarranted here because the videotape had little significance to the case. The trial court appropriately denied Hernandez's motion to dismiss.

Aggravated Sentence

¶10 Hernandez also argues that his aggravated sentence violates the Sixth Amendment because the state did not allege any aggravating factors in the indictment and a jury did not find the aggravating factors the court relied on proven beyond a reasonable doubt as required by *Blakely v. Washington*, 542 U.S. 296 (2004).[2] Hernandez failed to raise either of these issues below and has therefore forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error requires the defendant to demonstrate (1) error; (2) that the error was fundamental; and (3) that the error resulted in prejudice. *See id.* ¶¶ 19-20.

¶11 We first address Hernandez's contention that the state was required to allege aggravating factors in the indictment. This court has clearly held otherwise. *State v. Aleman*, 210 Ariz. 232, ¶ 23 & n.7, 109 P.3d 571, 578 & n.7 (App. 2005). Hernandez therefore has not demonstrated error, much less fundamental error.

¶12 We next address Hernandez's argument that his sentence was aggravated in violation of *Blakely*. "In *Blakely* . . . , the Supreme Court held that, generally, any fact that increase[s] a defendant's sentence beyond a 'statutory maximum' must be proved to the jury beyond a reasonable doubt." *State v. Martinez*, 218 Ariz. 421, ¶ 78, 189 P.3d 348, 363-64 (2008).

[2]Hernandez also briefly complains that the state "never filed a notice of proposed aggravating circumstances" after "filing the indictment." But this argument is undeveloped, supported by no authority, and therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶13 Here, Hernandez admitted that he had a prior felony conviction, and the trial court subsequently admitted the department of corrections' master file showing that conviction "for the purpose of sentencing." Although Hernandez's prior was used to enhance his sentence, the court did not rely upon it as an aggravator. Rather, in aggravating Hernandez's sentence, the court relied upon: (1) the "use or threatened use or possession of a deadly weapon or dangerous instrument during the commission of a crime"; (2) that "[Hernandez]'s conduct . . . was not an isolated incident but rather a continuing type of behavior"; and (3) that Hernandez's "actions were [un]provoked . . . and were without reason." We need not decide whether *Blakely* error occurred, however, because Hernandez must still show that any error was prejudicial in order to prevail. *See Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. To show prejudice, Hernandez must demonstrate "that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge." *See id.* ¶¶ 26-27.

¶14 One of the aggravating circumstances found by the trial court, adopted from the presentence report, was that "[Hernandez]'s conduct . . . was not an isolated incident, but rather a continuing type of behavior." Hernandez was charged with assaulting a guard while in prison. And the presentence report stated that Hernandez had committed forty-two other major violations as well as forty-one minor violations while in prison. While exercising his right to allocution, Hernandez admitted that half of those infractions were valid, that he "had to defend" himself and stated that "sometimes things just happen." And even if only half of the violations are valid, any reasonable jury would have to find that Hernandez's conduct was part of a long pattern of behavior. *Cf. State v.*

Cleere, 213 Ariz. 54, ¶ 12, 138 P.3d 1181, 1185 (App. 2006) (referring to presentence report and statements of counsel as support for lack-of-prejudice finding).

¶15 Once the jury had found this aggravating factor, the trial court would have been allowed to find any other aggravating circumstances. *See State v. Martinez*, 210 Ariz. 578, ¶¶ 26-27, 115 P.3d 618, 625-26 (2005) (holding once the jury finds one *Blakely*-compliant aggravating factor, the trial court is free to consider other aggravating factors not found by the jury without violating *Blakely*). Accordingly, Hernandez was not prejudiced by any *Blakely* error.

Conclusion

¶16 Based on the foregoing, we affirm Hernandez's conviction and sentence.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge